MOTION FILED
MAY 31 2001

(3)

No. 00-1618

IN THE

Supreme Court of the United States

Indeck Energy Services, Inc.,
and Indeck Saginaw Limited Partnership,
Petitioners,

v.

Consumers Energy Company and
CMS Energy Corporation,
Respondents.

On Petition for a Writ of Certiorari
from the United States Court of Appeals
for the Sixth Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Jennifer M. Granholm
Attorney General

Theodore E. Hughes
Assistant Attorney General
for Law

(517) 373-1123

J. Peter Lark
Assistant Attorney General
(Counsel of Record)

Michael E. Moody
Assistant Attorney General
Special Litigation Division
P.O. Box 30218
Lansing, MI 48909

May 31, 2001

15 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit applied an erroneous standard for pleading "antitrust injury" and "antitrust standing"?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN 1

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Indeck's Complaint Sufficiently Alleges "Antitrust Injury." 4

II. Indeck's Complaint Sufficiently Alleges "Antitrust Standing." 6

III. The Decision Below Has Substantial Continuing Significance 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page No.
Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983)	4,6
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	5
Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977)	3,4
California Dental Ass'n v. FTC, 526 U.S. 756 (1999)	2
Cargill, Inc. v. Monfort of Colo., 479 U.S. 104 (1986)	5
Chiropractic Ass'n v. Kelley, 79 Mich. App. 789, 262 N.W.2d 676 (1978)	2
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)	2
Illinois ex rel. Ryan v. Brown, 227 F.3d 1042 (7th Cir. 2000)	7
Kansas v. Utilicorp United, 497 U.S. 199 (1990)	2
S.D. Collectibles v. Plough, Inc., 952 F.2d 211 (8th Cir. 1991)	7

United States v. Topco Associates, Inc.,
405 U.S. 596, 610 (1972) 2

Statutes

MCL 14.28; MSA 3.181 2

MCL 16.150; MSA 3.29(50) 1

Other

Const of 1963, art. 5, § 21 1

Supreme Court Rule 37(6) 1

Staff Market Power Discussion Paper,
MPSC Case No. U-11290: Electric Restructuring
(June 5, 1998) 3,8,9

Status of Electric Competition in Michigan,
Michigan Public Service Commission,
(Feb. 1, 2001) 7,8,9,

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN

The Attorney General of the State of Michigan (Attorney General) respectfully moves for leave to file the instant brief *amicus curiae*[1] in support of Indeck's petition for a writ of certiorari. The Attorney General sought consent of the parties to file the instant brief *amicus curiae*; however, respondents, Consumers Energy Company and CMS Energy Corporation, withheld their consent.[2] The nature of the Attorney General's interest is set forth below.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN

The Attorney General of the State of Michigan respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

Amicus is the duly elected and qualified Attorney General of the State of Michigan and holds such office by virtue of the State Constitution of 1963, art. 5, § 21, and by mandate of the qualified electorate of the state. She heads the Department of Attorney General, which was created by the Executive Organization Act, 1965 P.A. 380, ch. 3; MCL 16.150 *et seq.*, MSA 3.29(50) *et seq.* Michigan law specifically contemplates that the Attorney General may "appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state

---

[1] Pursuant to Supreme Court Rule 37(6), the Attorney General recognizes and appreciates the assistance of counsel for petitioners in preparing the instant brief *amicus curiae*.

[2] This brief refers to the petitioners collectively as "Indeck" and the respondents collectively as "Consumers Energy."

may be a party or interested." MCL 14.28, MSA 3.181; *see also Chiropractic Ass'n v. Kelley*, 79 Mich. App. 789, 791, 262 N.W.2d 676 (1978) (holding that the Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed").

Amicus' interest in this case arises from her role as the principal defender of Michigan citizens' interest in free competition. As stated by this Court in *United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972)*:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.

Holding this same belief, the Attorney General has consistently pursued a policy of combating unlawful and anticompetitive trade practices, and devoting considerable attention to the field of energy competition.[3] The Attorney General has also appeared as an *amicus* in this Court in important matters involving the antitrust laws. *E.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Kansas v. Utilicorp United*, 497 U.S. 199 (1990).

This case is one of a limited number of private suits in which the Attorney General has participated. The Attorney General participated as an *amicus* in the district court proceedings and on appeal, and further participated in closely related proceedings before the Michigan Public Service

---

[3] In recent years, the Attorney General has also pursued antitrust allegations in the markets for health care services, pharmaceuticals, children's toys, shoes, telecommunications services, solid waste, and airline transportation.

Commission. As the Commission has recognized, fair competition in electricity markets is essential because "electricity is not just another commodity" – "it is one of life's necessities." *Staff Market Power Discussion Paper*, MPSC Case No. U-11290: Electric Restructuring 12 (June 5, 1998).

The Attorney General accordingly has determined that the interests of the people of the State of Michigan require her to file the instant *amicus curiae* brief urging this Court to grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

SUMMARY OF THE ARGUMENT

The purpose of this *amicus* brief is to make three points that establish the substantial importance of this case to the future of competition, both in electricity markets and generally.

First, under this Court's precedents, petitioner Indeck's complaint sufficiently alleges "antitrust injury," defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).[4] Indeck asserts that respondent Consumers Energy has engaged in a variety of anticompetitive activities – including withholding access to transmission facilities and refusing to provide power at reasonable rates – that had the purpose and effect of injuring competition. Those allegations easily satisfy the "antitrust injury" requirement. Although Indeck's complaint also addresses a specific contractual arrangement between Consumers Energy and General Motors Corporation, that contract is not the basis for the complaint.

---

[4] The Attorney General does not take a position on whether Indeck's allegations are true. As the petition for certiorari explains, no discovery on that question has yet been permitted. See p. 6.

Second, under this Court's precedents, Indeck has "antitrust standing" – *i.e.*, it is "a proper party to bring [this] private antitrust action." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 n.31 (1983). A competitor injured by the anticompetitive acts of its rivals falls squarely within the class of plaintiffs that may appropriately vindicate the antitrust laws. The Sixth Circuit's contrary holding appears to rest on the erroneous view that the plaintiff must be the *best* possible party to bring the action. In any event, on the allegations of this complaint, Indeck is in fact the best available plaintiff.

Third, the Sixth Circuit's holding that Indeck's complaint does not assert "antitrust injury" or "antitrust standing" has substantial significance. The decision below stands as a considerable obstacle to fair competition at a delicate point in the transition to competitive energy markets in Michigan and other states. Further, on its own terms, the Sixth Circuit's decision is not limited to the context of electricity markets. The Sixth Circuit's broad holding therefore presents a substantial invitation to monopolists and others in a variety of industries to engage in anticompetitive acts towards their rivals.

The petition for a writ of certiorari should accordingly be granted.

ARGUMENT

I. Indeck's Complaint Sufficiently Alleges "Antitrust Injury."

It is well-settled that a private antitrust plaintiff may state a claim only if it has suffered "antitrust injury." That term was defined by this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977), as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." In *Brunswick* and subsequent cases, this Court made clear that a plaintiff's lost profits resulting from a rival's aggressive

competition do not constitute "antitrust injury" because the antitrust laws are designed to encourage, not impede, competition. *Id.*; *see also Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104 (1986). But this Court has never held that a plaintiff does not suffer "antitrust injury" unless the defendant's activities injure consumers as well.

The injury asserted by Indeck's complaint is of the type the antitrust laws were intended to prevent – in other words, Indeck is not complaining about aggressively competitive acts by respondent Consumers Energy. The thrust of Indeck's complaint is that Consumers Energy has engaged in anticompetitive acts with the purpose and effect of excluding independent power producers (of which Indeck is one) from the market for supplying electricity to large industrial customers.[5] Indeck's complaint specifically asserts that Consumers Energy engaged in a series of activities with an anticompetitive purpose and effect, including refusing to provide customers of independent power producers with stand-by power on reasonable terms (¶ 30); discriminating against independents in the purchase of power (¶ 31); and refusing to provide access to essential transmission facilities (¶ 32). The Sixth Circuit acknowledged several of these allegations (*see* Pet'n for Cert. at 7-8), and Indeck's petition for certiorari collects more than a dozen others (*see id.* at 4-5 & nn.1-2).

Although the Sixth Circuit's decision principally discusses Indeck's allegations regarding Consumers Energy's contracts with General Motors, those allegations are not the focus of the complaint. Instead, as just noted, Indeck complains about the anticompetitive exclusion of itself and other independents from the market for large industrial customers. Even those

---

[5] The complaint refers to these customers as "the Relevant At Risk Market."

portions of the complaint that discuss the General Motors contracts reinforce this point. *E.g.*, ¶ 28 (alleging that Consumers Energy "ultimately frustrated the successful realization of the Saginaw and Flint Projects *and other independent power projects*" (emphasis added)). Further, Indeck's allegation is not that Consumers Energy offered discounted prices to General Motors (an allegation that, absent predatory pricing, would be insufficient under the *Brunswick* line of cases) – instead, Indeck asserts that Consumers Energy conditioned the lower prices on General Motors' agreement not to deal with independents and simultaneously raised Indeck's cost of doing business. Moreover, Indeck alleges that Consumers Energy "is not motivated by efficiency concerns, but instead, reflects its willingness to sacrifice short run profits for a long run exclusionary impact on competitive rivals such as Indeck." (¶ 51). If true, this is precisely the type of conduct the antitrust laws were intended to prevent.[6]

Because Indeck's complaint asserts that Consumers Energy engaged in anticompetitive activities, and furthermore asserts that Indeck was injured as a result of those anticompetitive activities, the Sixth Circuit erred in holding that Indeck failed to assert "antitrust injury."

II. Indeck's Complaint Sufficiently Alleges "Antitrust Standing."

As to Indeck's allegations regarding the General Motors contract, the Sixth Circuit suggested that Indeck lacked "antitrust standing" – *i.e.*, that Indeck was not "a proper party to bring [this] private antitrust action." *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534 n.31 (1983). That conclusion is not supportable. A plaintiff injured by the anticompetitive acts of

---

[6] Indeck would, of course, have to establish not only its standing to sue, but also the substantive requirements of its alleged antitrust claims.

its rival is uniquely well-situated to vindicate the interests protected by the antitrust laws.

Even if the Sixth Circuit was correct in concluding that a consumer would also have antitrust standing, that does not mean that Indeck does not. Other circuits have consistently so held. *E.g.*, *Illinois ex rel. Ryan v. Brown*, 227 F.3d 1042, 1046 (7th Cir. 2000) ("normally only consumers *or* competitors have [antitrust] standing" (emphasis added)); *S.D. Collectibles v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) ("The antitrust laws were designed to protect competition and therefore standing is generally limited to actual market participants, that is, competitors *or* consumers." (emphasis added)). Indeed, Indeck rightly points out that there is substantial doubt regarding whether a consumer would bring such a claim. That is particularly true when, as in this case, the consumer arguably benefited from lower prices in the short term.

The Sixth Circuit thus erred in holding that Indeck lacks "antitrust standing" as to the allegations regarding General Motors.

III. The Decision Below Has Substantial Continuing Significance.

Certiorari is also warranted given the importance of this case to competition, both with respect to energy markets and also more generally. The decision below comes at a nascent period in the development of electricity competition in Michigan, in the other states comprising the Sixth Circuit, and throughout the nation. "Competition in the electric marketplace in Michigan remains in its infancy." Michigan Public Service Commission, *Status of Electric Competition in Michigan* 7 (Feb. 1, 2001). The instant case is an important case regarding the ability of public utilities to obstruct the ability of independent power producers to enter energy markets.

The Sixth Circuit's holding that Indeck may not sue to vindicate the interests of the antitrust laws thus has the potential to impede the transition to free competition. As Michigan's Public Service Commission recognized in the very first sentence of its report on competition in electricity markets, because two utilities (Consumers Energy and Detroit Edison) "together control[] nearly ninety percent of electricity sales in Michigan, market power is a significant concern as the State moves forward to establish a competitive generation market for electricity." *Staff Market Power Discussion Paper*, MPSC Case No. U-11290: Electric Restructuring 1 (June 5, 1998). The Commission concluded its report by stating that, "successful restructuring of Michigan's electric industry to establish a robust competitive market may well hinge upon the ability to effectively mitigate market power. . ." *Id.* In fact, Michigan is accordingly now undertaking to "provide[] incentives for non-utility entrants in the Michigan electric marketplace," to "permit the introduction of competition to continue." *Status of Electric Competition in Michigan*, *supra*, at 7 (Feb. 1, 2001). Such a competitive electric market is essential in Michigan in order to avoid the "worst of all worlds," a transition from regulated electric monopolies to unregulated electric monopolies. *See Staff Market Power Discussion Paper*, *supra*, at 67. The Sixth Circuit's holding has the substantial potential to impede the

State of Michigan's effort in trying to safely navigate that transition.[7]

Moreover, it bears noting that the Sixth Circuit's decision is not limited to the context of electricity markets. The Sixth Circuit appears to have held that competitors may not bring suit on the basis of injuries suffered by themselves alone. Such a holding presents a substantial invitation to monopolists and others to engage in anticompetitive conduct towards their rivals in an array of markets.

---

[7] The issues raised by Indeck's complaint are indisputably substantial in the transition to competition. "Without adequate transmission, new suppliers are unable to secure and deliver power to their customers." *Status of Electric Competition in Michigan*, *supra*, at 5. In addition, in certain circumstances, exclusive power contracts "are designed to lock customers in to long-term commitments, forestalling competition and discouraging new entrants from entering the market." *Staff Market Power Discussion Paper*, *supra*, at 64.

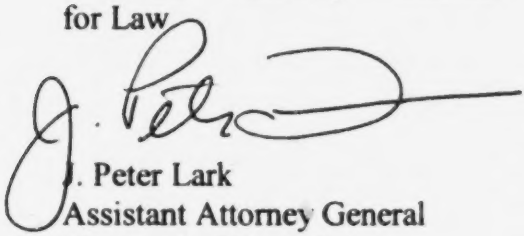
CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JENNIFER M. GRANHOLM
Attorney General

Theodore E. Hughes
Assistant Attorney General
for Law



J. Peter Lark
Assistant Attorney General
(Counsel of Record)

Michael E. Moody
Assistant Attorney General
Special Litigation Division
P.O. Box 30218
Lansing, MI 48909
(517) 373-1123)

May 31, 2001